JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

April 3, 2003

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the views of the Judicial Conference of the United States with regard to Section 109 ("Sentencing Reform") of S. 151, the "Child Abduction Prevention Act," as passed by the House of Representatives on March 27, 2003. The Judicial Conference strongly opposes several of these sentencing provisions because they undermine the basic structure of the sentencing system and impair the ability of courts to impose just and responsible sentences.

At the outset, we must note our concern and disappointment with the lack of careful review and consideration that this proposal has received. While it constitutes one of the most fundamental changes to the basic structure of sentencing in the federal criminal justice system in nearly two decades, the review by Congress to date consists of a hearing at the subcommittee level in the House of Representatives on only part of Section 109 and limited debate on an amendment on the House floor. The Senate has held no hearings on this legislation at all. Neither the Judicial Conference nor the Sentencing Commission has been given a fair opportunity to consider and comment on this proposal. In our opinion, provisions that would have a significant impact on the administration of criminal justice should not be resolved without careful study and deliberation. The risk of unintended consequences should not be taken on such an important matter.

Section 109(a) of this bill would amend 18 U.S.C. § 3553(b) to restrict courts' authority to depart downward from the sentencing guideline range to those situations specifically identified by the Sentencing Commission as grounds for downward departures. The Sentencing Reform Act of 1984 created a system of prescriptive sentencing, but Congress wisely recognized that any

system that provides for sentencing based upon fixed sentencing factors should include a means to impose a just and responsible sentence on the rare defendant whose offense is not addressed by those sentencing factors. The means chosen was to allow for either upward or downward departures if the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately considered by the Sentencing Commission." This system recognizes that a court should possess the authority to consider unforseen circumstances it deems relevant to sentencing determinations, and we urge the current system be retained.

Sections 109(b), (g) and (i) make specific changes to existing sentencing guidelines to, among other things, restrict the bases for downward departures. The Judicial Conference opposes direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise in establishment of the Commission -- that an independent body of experts appointed by the President and confirmed by the Senate is best suited to develop and refine sentencing guidelines. We recommend instead that the Sentencing Commission be directed by Congress to study the amendment of any particular guideline and either adjust the guideline or report to Congress the basis for its contrary decision.

Section 109(d) would alter the standard of appellate court review of departure decisions from "due deference" regarding a sentencing judge's application of the guidelines to a "*de novo*" standard of review. In *Koon v. United States*, 518 U.S. 81 (1996), the Supreme Court interpreted the "due deference" standard to require appellate courts to review district court departure decisions for abuse of discretion. The Judicial Conference opposes rescission of the current standard, which recognizes that district judges are better positioned to decide departures, and the substitution of *de novo* review, which would not adequately guide courts in subsequent departure cases that, by their very nature, are not amenable to useful generalization.

Section 109(h) would amend 28 U.S.C. § 994(w) to require the chief judge of each district to assure that certain sentencing records, including the judgment, statement of reasons, plea agreement, indictment or information, and presentence report, are forwarded to the Sentencing Commission. Current law, by contrast, requires the sentencing court or other officer to transmit to the Sentencing Commission a "written report of the sentence" and other information as determined by the Sentencing Commission, recognizing that the Commission is best able to determine the information it needs to fulfill its statutory responsibilities. We oppose this additional burden upon the courts.

This section would further require the Commission, upon request, to provide these newly specified documents to the Senate and House Judiciary Committees. This provision raises two serious concerns. First, presentence reports are retained within the control of the courts and the Department of Justice in order to protect the safety and privacy of individuals identified in the course of criminal prosecutions and sentencings. In the absence of strict accommodations to protect this sensitive information, we believe this practice should be retained. Second, we oppose the systematic dissemination outside the court system of judge-identifying information in criminal case files. The Sentencing Commission compiles and releases annually comprehensive

statistics on all federal sentences. Among other things, this data provides for each court the percentage of defendants who receive substantial assistance departures and the percentage of defendants who receive other downward departures. We urge Congress to meet its responsibility to oversee the functioning of the criminal justice system through use of this and other information without subjecting individual judges to the risk of unfair criticism in isolated cases where the record may not fully reflect the events leading up to and informing the judge's decision in a particular case.

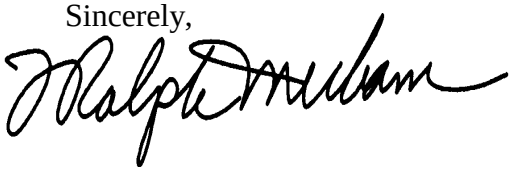
In the event that Congress determines to go forward with this legislation, we urge that, at the least, the Judiciary Committees await the results of ongoing studies into downward departures being conducted by the Sentencing Commission and the General Accounting Office. To underline this point, an Associate Deputy Attorney General testified to a House Judiciary subcommittee why the "disturbing trend" in downward departures in non-immigration cases on grounds other than substantial assistance to the government justified "long overdue reform" in sentencing procedures. The Department of Justice statement cited statistics to prove this point; that is, these downward departures rose from 9.6 percent of cases in FY 1996 to 14.7 percent of cases in 2001. The fact is that there were 5,825 more non-substantial assistance downward departures in FY 2001 than in FY 1996. Of the increase, 4,057 occurred in the five southwest "border court" districts and 1,755 occurred in the other 89 United States district courts. In other words, the "border" districts accounted for almost 70 percent of the increase. The "disturbing trend" is not a national trend, but one more vivid measure of the crisis in the administration of criminal justice on the border. S. 151 recognizes that high downward departures in the border courts are a special circumstance and cannot be eliminated. By no means do "border court" problems and statistics support the elimination of this type of downward departure in all other district courts.

It is also important to note that, popular conceptions notwithstanding, the fact that a defendant is granted a "downward departure" does not mean that the defendant was not punished adequately for the crime. Eighty-five percent of defendants granted non-substantial assistance departures in FY 2001 were sentenced to prison.

Finally, we strongly recommend that, after the data on downward departures is compiled and analyzed, hearings be held so that the views of the various entities with expertise and interest in federal criminal sentencing can be carefully considered with regard to the ramifications of this proposal. Congress should not alter the sensitive structure of the sentencing system without reasonable certainty as to the consequences of such legislation.

We appreciate your consideration of the views of the Judicial Conference on this significant legislation. If you have any questions regarding these views, please do not hesitate to contact me at 202/273-3000. If you prefer, you may have your staff contact Michael W. Blommer of the Office of Legislative Affairs at 202/502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy, Ranking Member
Members, Senate Judiciary Committee